

Phil 324: Law and Morality

Sections 104/204, Summer 2020

Online Asynchronous, 5 Week 2 (July 13–August 12)

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1 Course Overview & Objectives

What is the relationship between law and morality? Can a morally indefensible law nonetheless be *legally* valid? If so, do we have a *moral* obligation to obey such a law just because it is the law? Is civil disobedience ever justifiable, and, if so, under what circumstances? When judges interpret the law, do they follow moral principles even if those principles were never really enacted into the law by a legislature? Should they? Is there even a *right* answer as to how a case should be decided, distinguishable from the final answer given by a court of last resort such as the US Supreme Court (or, as it has increasingly been the case, a narrow 5–4 majority)? In this course, we survey leading answers to these questions from the philosophy of law.

Our aim here is not only to consider philosophical puzzles about the relationship between law and morality, but also to investigate their jurisprudential implications for a variety of issues of concern to feminist, antiracist philosophy of law: We revisit the Supreme Court’s historic decision in *Brown v. Board of Education* (1954) to declare the racial segregation of public education inherently unequal. We trace the development of the Court’s gender equality jurisprudence and critically assess its adequacy. We consider the way gender discrimination may be obscured by a lack of appreciation of intersectionality. We also look at the Court’s very recent holding in *Bostock v. Clayton County* (2020) that firing an employee because of their sexual orientation or gender identity constitutes *sex* discrimination in violation of Title VII of the Civil Rights Act of 1964. Finally, we turn to issues of *substantive* gender inequality. We closely study the Court’s abortion jurisprudence, including its landmark decision in *Roe v. Wade* (1973) to recognize a fundamental right to abortion. We examine competing proposals to reform the traditional legal definition of rape as sex that

1. If you are unfamiliar with the use of “they” as a singular pronoun, check out this helpful guide on the APA Style blog: <https://apastyle.apa.org/blog/singular-they>.

has to be both forcible and nonconsensual. And we conclude the course with reflections on another recent case, *Doe v. Boyertown Area School District* (2018), in which the Third Circuit Court of Appeals upheld the school district's policy to allow transgender students to access sex-segregated spaces according to their gender identity.

It will probably come as no surprise that these are also some of the most contentious issues that just so easily end up dividing us. By introducing you to the analytical tools that legal and moral philosophy has to offer, the broader aim of this course is to help you learn to engage in sincere and reflective dialogues with your peers, to defend and criticize views with reasoned arguments and responses, and perhaps most importantly, to think *for yourself*.

2 Expected Learning Outcomes

My expectations are, at the conclusion of this course, you will be able to

1. Explain the disagreement between natural law theory, legal positivism and legal interpretivism on the relationship between law and morality;
2. Illustrate various aspects of the relationship between law and morality in the contexts of judicial interpretation, political obligation, civil disobedience, racial equality, gender equality, LGBTQ+ rights, abortion rights, and rape law reform;
3. Charitably interpret and critically assess philosophical texts and arguments;
4. Compose a well-reasoned, original argumentative essay that responds to a philosophical issue at the intersection of law and morality;
5. Discuss how philosophical reflection may shed light on contested moral and legal issues in a divided contemporary society such as the US;
6. Discuss how conceptual tools may help to clarify and express minority experiences that are otherwise masked by oppressive social structures.

Phil 324 is cross-listed in Political Science and Public Administration & Policy.

3 Required Texts

None. All required readings will be made available on D2L or via the UA Libraries.

4 Teaching Format & Expectations for Students

As our course will be delivered entirely online, it is *really* important that you understand what is expected of you each week.

4.1 D2L

First of all, you are expected to be able to use the University's D2L course website. If you have never used D2L before, I highly recommend taking the D2L New Student Orientation: <https://help.d2l.arizona.edu/content/student-orientation-course>.

I'm more than happy to help you with any technical issues with D2L. I understand how frustrating this can be, but I wouldn't be able to help if there weren't enough time. So, please be proactive and seek help early, rather than wait until close to a deadline.

I also suggest making good use of the D2L Help Pages (<https://help.d2l.arizona.edu/>) and the University's 24/7 IT Support (<https://it.arizona.edu/service/247-it-support>). It'd probably take less time to get a solution from them than from me, since, unfortunately, physical laws prevent me from being available 24/7.

4.2 Course Structure

Our course is divided into 12 *modules*, each of which is roughly equivalent to 2–3 lectures in the semester-long, in-person version of this course. You are expected to complete 3 **modules each week** in the first 4 weeks. No modules are assigned to the 5th and final week so you can use the time to work on your final essay. For each module, please

1. Do all assigned readings as you follow and complete the reading guide;
2. Watch all assigned lectures; and
3. Discuss the readings and lectures by participating in the discussion board.

Additionally, there will be a final essay, which you will be asked to draft, peer review, and revise.

There is no firm deadline by which you must do the readings and watch the lectures. However, the reading guides, discussion posts and all other assignments must be completed by specific deadlines.

4.3 Readings

You are expected to have *done* the assigned readings before watching the lectures. I will provide a reading guide for each module to guide you through the readings. Please follow the reading guide and answer the **bolded** questions as you read.

Please expect to spend 2 to 3 hours reading for each module. I understand that this is not a trivial time commitment, but it's unlikely that you will find yourself prepared enough to follow lectures and contribute to class discussion if you don't do the readings.

4.4 Please Do Not Procrastinate!

Procrastination is probably the biggest impediment to success in an online course. And given the fast pace of our 5-week format, if you fall behind, there may be little time for you to catch up. Please do all the readings, don't wait until the last minute to rush through the lectures, remember to turn in assignments on time, and start thinking about your final essay early. The modular structure is in place to help you keep track of your progress, but most will still depend on your own efforts!

5 Respect, Care for and Support One Another

5.1 Material in This Course

Since many of the issues we will cover in this course are not just intellectually but also *personally* relevant, you might find it uncomfortable to read and discuss certain course material. I want to acknowledge that—it's perfectly understandable. And it is therefore important that we *respect, care for* and *support* one another throughout the course. Please always feel free to talk to me if you anticipate certain material to be especially difficult for you, or if you think the way certain material gets discussed in the class is disrespectful or otherwise problematic.

5.2 How to Respect, Care for and Support One Another

Respecting, caring for and supporting your classmates and your instructor can come in a variety of ways. Here are some concrete examples:

- Value everyone's contribution to class discussion;
- Disagree in a way that takes other people's ideas seriously and sincerely;
- Challenge remarks, jokes and examples that are racist, sexist, misogynistic, xenophobic, homophobic, transphobic, ableist, ageist, classist, etc.;
- Keep discussions inclusive by avoiding talking to only a few specific people;
- Be mindful of how your tone/meaning may not be accurately conveyed through your writing alone (for example, if your question could be misunderstood as a rhetorical one, it's probably a good idea to explicitly indicate that it is a genuine question);
- Use people's preferred pronouns, names and descriptions of their gender (identity) and sexual orientation;
- Avoid visually telling a person's gender (identity) and/or sexual orientation;
- Be careful not to out anyone who does not wish to come out, whether openly or to specific people;

- Use women and LGBTQ+ inclusive language (for helpful examples, see <https://www.apaonline.org/page/nonsexist>).

If you feel any aspect of this course results in barriers to your inclusion or ability to participate, please let me know as soon as possible—that is *very* important to me.

5.3 University Statements on Threatening Behavior, Discrimination and Harassment

The UA Threatening Behavior by Students Policy prohibits threats of physical harm to any member of the University community, including to oneself; see <http://policy.arizona.edu/education-and-student-affairs/threatening-behavior-students>.

The University is committed to creating and maintaining an environment free of discrimination; see <http://policy.arizona.edu/human-resources/nondiscrimination-and-anti-harassment-policy>.

Our classroom is a place where everyone is encouraged to express well-formed opinions and their reasons for those opinions. We also want to create a tolerant and open environment where such opinions can be expressed without resorting to bullying or discrimination of others.

6 Assessment

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|---|-----|
| Reading Guides | 30% |
| Structured Discussion Posts | 20% |
| Final Essay (Draft, Peer Review & Revision) | 50% |

All required assignments must be completed in order to pass this course. **An F received on any work due to academic dishonesty is grounds for an F in the course.**

6.1 Grade Scheme

The University of Arizona Standard Letter Grade Scheme will apply:

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|---|---------------|---|-----------------|
| A | 90% and above | D | 60%–69.9% |
| B | 80%–89.9% | E | 59.9% and below |
| C | 70%–79.9% | | |

Requests for incomplete (I) or withdrawal (W) must be made in accordance with University policies, which are available at <http://catalog.arizona.edu/policy/grades-and-grading-system>.

6.2 *Reading Guides*

Reading philosophy is hard! To help you get the most out of the readings, I will provide a reading guide for each module. The reading guide is designed to walk you through the key terms and definitions, and help you identify the argumentative structures and moves. Please follow and answer **bolded** questions on the reading guide as you do the readings. Reading guides are due by **10pm on the corresponding Friday**.

Reading guides will make up 30% of your final grade.

6.3 *Structured Discussion Posts*

Philosophy is written in a very non-obvious style, and learning to write in that style often turns out to be challenging. My hope is that, by starting with short discussion posts, you will have the opportunity to develop your philosophical writing skills in a much less intimidating manner.

There will be a discussion topic for each module. You will be asked to participate in 8 of the 12 discussion topics by engaging in an “objection-reply” conversation with your classmates:

- *Initial Post:* You will first write one or two paragraphs (roughly 250 to 300 words) in which you (1) explain an argument from course material, and then (2) respond to that argument by either raising an objection or defending it against a potential objection. I will provide prompts in advance, but feel free to write your own prompt especially later in the course. The initial post is due to the discussion board **by 10pm on the Friday of the corresponding week**.
- *Objection Post:* You will then respond to another student’s initial post. Your response should be about 125 to 150 words. Although it’s customary to call it an “objection,” you should feel free to disagree *or* agree with your classmate: you can raise an objection to their argument, offer a further consideration that they don’t seem to have given enough thought to, or defend their argument against a potential objection. Please respond first to students that have not yet received an objection post. If you fail to do so, I may ask you to redo your objection post. The objection post is due **by 10pm on the corresponding Sunday**.
- *Reply Post:* Finally, you will reply to the objection(s) you received. There is no length requirement for the reply post(s), but please try to engage in sincere and constructive conversations with your peers. The reply post(s) are due **by 10pm on the corresponding Tuesday**.

Structured discussion posts will make up 20% of your final grade. If you participate in

more than 8 discussion topics, only the highest 8 grades will count toward your final grade.

6.4 *Final Essay*

You will be asked to write a final essay for this course. It will be an opportunity for you to engage with course material in depth while continuing to develop your philosophical writing skills. Your final essay should be 6–8 pages (roughly 1500–2000 words) long. I will distribute instructions, prompts and a rubric in advance.

You must turn in a draft of your final essay. Failure to turn in a draft on time will be penalized by up to a full letter grade (10%) on the revision. While the draft will not be graded, it will receive comments from both your classmates and me. You are also expected to read and comment on two other students' drafts. The revision must be substantive, and must respond to comments received.

I'm happy to brainstorm ideas or read outlines/drafts during office hours (please email me to set up an appointment!). I strongly encourage all of you to meet with me at least once to discuss your final essay.

The final essay will make up 35% of your final grade, and your participation in the peer review process another 15%.

7 Grading Policies

7.1 *Anonymous Grading*

To help reduce implicit biases, please prepare anything you turn in (not including discussion posts, unless otherwise instructed) for anonymous grading by **providing only your UA student ID number**.

7.2 *Time Zone*

Unless otherwise specified, all times and dates listed on this syllabus are **Mountain Standard Time (MST)**. MST is 7 hours behind the Coordinated Universal Time (UTC-7). Please be careful that MST is not the same as Mountain Time (MT) or Mountain Daylight Time (MDT), as Tucson does *not* observe Daylight Saving Time. By adjusting D2L settings, you can display deadlines according to your local time zone (see <https://help.d2l.arizona.edu/content/students-my-home-page#5>). Time zone issues are not legitimate excuses for late or missed assignments.

7.3 Late Assignments, Extensions, and Make-Up Assignments

As per University policy, please do not email me medical documentation or personal and private medical information.

No late assignments will be accepted. All requests for extensions must be sent to me by email **no later than 24 hours before the deadline**. As long as you provide a plausible reason and a clear plan for completing the assignment, an extension will likely be granted.

Make-ups for missed assignments will be granted only for legitimate emergencies. Please let me know about your situation as soon as reasonable. But unless extraordinary circumstances can justify a delay, please send me your request by email **within 10 days of the original assignment due date**, and certainly by the last day of class.

7.4 Sorry, But No Extra Credit

I do *not* offer extra credit for fairness reasons: It is usually students who already have excellent grades that are motivated to take advantage of extra credit opportunities (e.g., by doing additional assignments) and who more often actually earn extra credit (e.g., by correctly answering tricky bonus questions). Also, students can effectively be penalized for not doing extra credit work, especially when many others do get extra credit. Finally, the forms of extra credit I considered using, such as public lecture attendance outside of class, cannot avoid disproportionately disadvantaging students who have to work, or have kids to take care of, etc.

I highly recommend checking out this light reading (in Hermione's sense, of course) on the ethics of extra credit by Professor Nathan Nobis: <https://1000wordphilosophy.com/2018/02/25/ethics-and-extra-credit/>.

8 Academic Dishonesty

8.1 Code of Academic Integrity

Students are encouraged to share intellectual views and discuss freely the principles and applications of course materials. However, graded work/exercises must be the product of independent effort unless otherwise instructed. Students are expected to adhere to the UA Code of Academic Integrity as described in the UA General Catalog. See <http://deanofstudents.arizona.edu/academic-integrity/students/academic-integrity>.

8.2 Plagiarism

The University Libraries explain that “[p]lagiarism is using other people’s ideas and words without clearly acknowledging the source of that information.” There should be no mis-

understanding about word for word transcriptions or simple paraphrases—these *must* be acknowledged through proper citations.

It is sometimes not clear, though, when simply using the ideas of another requires citation. This is especially true in the context of a course in which you are presumably acquiring fundamental ideas of a subject matter from the text or the instructor. Certain ideas are in the public domain, so to speak; they are ideas used by everyone working in the field, and do not require citation. Other ideas are such that their origin needs to be acknowledged. It is sometimes difficult for beginning students to distinguish these, though. It is helpful to remember that what is at issue is whether the failure to acknowledge a source would tend to misrepresent the idea as your own. The failure to acknowledge your source for a distinction between consequentialism and deontology, for example, would not tend to misrepresent the distinction as your own since it is a distinction that most people working in the field will draw in some way or other. To offer a *specific* account of this distinction that is offered by another without citing the source could easily tend to misrepresent the account as your own. It is clearly better to err on the side of over-acknowledgment in cases where you are in doubt.

The University Libraries have prepared excellent tips for avoiding plagiarism, available at <https://new.library.arizona.edu/research/citing/plagiarism>. If, after reading it, you have questions about what constitutes plagiarism, please do not hesitate to ask me.

8.3 Acknowledgments

Whether you consider yourself a skilled writer or not, it's really helpful to exchange drafts of your final essay with your classmates. I also strongly encourage you to make use of the Writing Center's free tutoring services (see <https://thinktank.arizona.edu/writing-center>).

That said, you should always acknowledge *all* the help and feedback that contributed to your thought and writing. It is standard scholarly practice to include an acknowledgments section at the end of your essay, or place a footnote or endnote where you acknowledge being helped with a particular issue, point, piece of evidence, or line of argument. Look for examples in our assigned readings.

8.4 Inappropriate Student Use of Class Notes and Course Materials

Taking notes is a means of recording information but more importantly of personally absorbing and integrating the educational experience. However, disseminating class notes and/or course materials beyond the classroom community, including but not limited to selling them to other students or to a third party for resale, is strictly prohibited without the instructor's express prior written consent.

Inappropriate student use of class notes and course materials seriously undermines instructor interests in their intellectual work while not substantially furthering instructor and student interests in effective learning. It violates shared norms and standards of the academic community, is subject to the *Code of Academic Integrity*, and may result in course sanctions. Additionally, students who use D2L or UA email to sell or buy such notes or course materials are subject to *Code of Conduct* violations for misuse of student email addresses. Finally, this misconduct may also constitute copyright infringement.

You are allowed to exchange notes with classmates enrolled in the same semester, but may not share notes with students enrolled in future semesters or consult notes from students enrolled in previous semesters.

9 Accessibility and Accommodations

Our goal in this classroom is that learning experiences be as accessible as possible. If you anticipate or experience physical or academic barriers based on disability, please let me know immediately so that we can discuss options. You are also welcome to contact the Disability Resource Center (520-621-3268) to establish reasonable accommodations. For additional information on the Disability Resource Center and reasonable accommodations, please visit <http://drc.arizona.edu>.

If you have reasonable accommodations, please plan to meet with me by appointment or during office hours to discuss accommodations and how my course requirements and activities may impact your ability to fully participate.

10 Absence and Class Participation

The UA policy concerning class attendance, participation, and administrative drops is available at <http://catalog.arizona.edu/policy/class-attendance-participation-and-administrative-drop>.

The UA policy regarding absences for any sincerely held religious belief, observance or practice will be accommodated where reasonable: <http://policy.arizona.edu/human-resources/religious-accommodation-policy>.

Absences preapproved by the UA Dean of Students (or the Dean's designee) will be honored; see <http://policy.arizona.edu/employmenthuman-resources/attendance>.

11 Syllabus Change

Information contained in the course syllabus, other than the grade and absence policy, may be subject to change with advance notice, as deemed appropriate by the instructor.

12 (Lack of) Diversity in Philosophy

Unfortunately, philosophy as an institutionalized discipline is remarkably male and remarkably white. This lack of diversity is often apparent just by looking at the topics and the authors typically taught in introductory philosophy courses. However, philosophy is becoming more and more diverse thanks to the efforts of multiple generations of philosophers. In the second half of the class, we will discuss topics central to feminist legal theory and philosophy, and we will have chances to read several distinguished authors who are themselves members of underrepresented groups.

As a philosophy student, you can also help the profession address its diversity and inclusiveness problems by seriously engaging with the works of minority authors and supporting your fellow minority students.

13 Schedule

I. Traditional Philosophy of Law

Module 1 Law and Morality: Natural Law Theorists' Views

Please read in advance (in this order):

- Lon Fuller, *The Morality of Law* (Rev. ed. 1969), appendix
- Thomas Aquinas, selections from *Summa Theologiae* I-II
- Lon Fuller, *The Morality of Law*, chapter II, sections 1–2; chapter III, section 1; chapter IV, sections 1, 3–4

Module 2 Law and Morality: Legal Positivists' Views

Please read in advance:

- John Austin, selections from *The Province of Jurisprudence Determined* (1832)
- H.L.A. Hart, *The Concept of Law* (3rd ed. 2012), chapter V; chapter VI, section 1; chapter IX, sections 2–3

Module 3 Law and Morality: Dworkin's Criticism of Hart; Hart's Reply

Please read in advance:

- Ronald Dworkin, *Taking Rights Seriously* (1977), chapter 2
- H.L.A. Hart, *The Concept of Law*, postscript

Reading guides 1–3 due on Friday, July 17 by 10pm

Modules 1–3 initial posts due on Friday, July 17 by 10pm

Modules 1–3 objection posts due on Sunday, July 19 by 10pm

Module 4 How Should Judges Interpret the Constitution and Laws?

Please read in advance:

- *Plessy v. Ferguson* (1896); *Brown v. Board of Education* (1954)
- Ronald Dworkin, *Law's Empire* (1986), selections from chapter 7
- Antonin Scalia, selections from *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (1997)

Modules 1–3 reply posts due on Tuesday, July 21 by 10pm

Module 5 Are We Morally Required to Obey the Law?

Please read in advance:

- John Rawls, “Legal Obligation and the Duty of Fair Play,” in *Law and Philosophy*, ed. Sidney Hook (1964)
- M. B. E. Smith, “Is There a Prima Facie Obligation to Obey the Law?”, *Yale Law Journal* (1973)

Module 6 When Might Civil Disobedience Be Justified?

Please read in advance:

- Martin Luther King, Jr., “Letter from Birmingham Jail” (1963)
- John Rawls, selections from *A Theory of Justice* (1971)

Reading guides 4–6 due on Friday, July 24 by 10pm

Modules 4–6 initial posts due on Friday, July 24 by 10pm

Modules 4–6 objection posts due on Sunday, July 26 by 10pm

II. Feminist Philosophy of Law

Module 7 Gender Inequality: Discrimination or Subordination?

Please read/listen to in advance:

- *Bradwell v. State of Illinois* (1873); *Reed v. Reed* (1971); *Frontiero v. Richardson* (1973); *Craig v. Boren* (1976); *United States v. Virginia* (1996) (opinion announcement)
- Catharine MacKinnon, “Difference and Dominance: On Sex Discrimination,” in *Feminism Unmodified: Discourses on Life and Law* (1987)

Modules 4–6 reply posts due on Tuesday, July 28 by 10pm

Module 8 Intersectional Discrimination: Gender and Race

Please read in advance:

- Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum* (1989)
- Angela Harris, “Race and Essentialism in Feminist Legal Theory,” *Stanford Law Review* (1990)

Module 9 Intersectional Discrimination: Sex, Sexual Orientation and Gender Identity

Please read in advance:

- *Loving v. Virginia* (1967); *Hively v. Ivy Tech Community College* (7th Cir. 2017); *Bostock v. Clayton County* (2020)

Reading guides 7–9 due on Friday, July 31 by 10pm

Modules 7–9 initial posts due on Friday, July 31 by 10pm

Modules 7–9 objection posts due on Sunday, August 2 by 10pm

Module 10 Substantive Inequality: Abortion Rights

Please read/listen to in advance:

- *Griswold v. Connecticut* (1965); *Roe v. Wade* (1973); Note on *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992); *Whole Woman’s Health v. Hellerstedt* (2016) (opinion announcement)
- Ruth Bader Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” *North Carolina Law Review* (1987)
- Suggested: *Jane Medical Services v. Russo* (2020)

Modules 7–9 reply posts due on Tuesday, August 4 by 10pm

Module 11 Substantive Inequality: Rape Law Reform

Please read in advance:

- Michelle J. Anderson, “Negotiating Sex,” *Southern California Law Review* (2005)

Draft of final essay due on Wednesday, August 5 by 10pm

Module 12 Substantive Inequality: Transgender Rights

Please read/watch in advance:

- *Doe v. Boyertown Area School District* (3d Cir. 2018)
- “Doe ex rel. Doe v. Boyertown Area School District,” *Harvard Law Review* (2019)
- Today, “The Life of Transgender Teen Aidan Destefano: ‘I Always Felt Like I Was Different’ ” (2017), <https://www.youtube.com/watch?v=CQdYeKHhW4k>
- Suggested: Hi-Phi Nation, “For Women Only” (2019), podcast, parts 1–2

Reading guides 10–12 due on Friday, August 7 by 10pm

Modules 10–12 initial posts due on Friday, August 7 by 10pm

Peer review of final essay due on Saturday, August 8 by 10pm

Modules 10–12 objection posts due on Sunday, August 9 by 10pm

Modules 10–12 reply posts due on Tuesday, August 11 by 10pm

Revision of final essay due on Wednesday, August 12 by 10pm